IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 76-957

D. L. WITHINGTON

VERSUS

FEDERAL ENERGY ADMINISTRATION
AND FRANK G. ZARB ADMINISTRATOR

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS, FOR THE TENTH CIRCUIT.

D. L. Withington
D. L. WITHINGTON
PETITIONER PRO SE
4539 SOUTH LEWIS
TULSA, OKLAHOMA 74105

I N D E X

APPENDIX

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FEDERAL ENERGY ADMINISTRATION
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PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS, FOR THE TENTH CIRCUIT.

D. L. Withington, Pro Se Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, for the Tenth Circuit entered on August 25, 1976, and of the United States District Court for the Northern District of Oklahoma, entered on June 10, 1976 and the refusal of the Temporary Emergency Court of Appeals to file Appeal on September 16, 1976.

D. L. Withington

D. L. WITHINGTON
PETITIONER PRO SE
4539 SOUTH LEWIS
TULSA, OKLAHOMA 74105

CITATION TO OPINION

The United States District Court for the Northern District of Oklahoma ordering entry of judgment dated June 10, 1976 is reproduced in Appendix "A"

Plaintiff's Pro Se, letter of 9-23-76 confirming reasons for the mix-up of court proceedure. Appendix "A-1"

The United States Court of Appeals Tenth Circuit entry of judgment dated August 25, 1976 was dismissed on the grounds that jurisdiction lies with the Temporary Emergency Court of Appeals (TECA). This opinion is reproduced in Appendix "B"

The Temporary Emergency Court of Appeals of the United States office of the Clerk letter dated 9-16-76 refusing to file because of time lapse. See Appendix "C"

The United States District Judge Joseph W. Morris case # 75-84-C, 75-85-C, 75-86-C has ruled that these cases do, indeed involve a substantial constitutional issue, thus defeating a move for dismissal by the federal government and certified the cases to the Temporary Emergency Court of Appeals. See Appendix "D"

Certification by the United States Court of Appeals 10 Circuit letter of 11-11-76, see Appendix "E"

JURISDICTION

The jurisdiction of this court is invoked pursuant to Title 28, Section 1254 (1)(2) of the United States Code, as directed on 11-18-76 by the office of the Clerk of the United States Supreme Court.

QUESTIONS AND ANSWERS PRESENTED

The nature of the proceedings and statutes are covered in part by the take off from the certified transcript that follows: Plaintiff (page 82) "Well, am I to understand then the 5th & 10th Amendments you say they don't apply? Court: I am saying that the rulings of the Agency, the regulations of the agency, are within its mandate, its congressional mandate." Page 81, the Courts have too often found, and even within the findings though this is a relatively recent Act, the TECA of the U. S. has upheld the activities, Constitutional questions, as Mr. Withington raises them, too many times to warrant their being submitted again". Plaintiff contends that this statement is not so, because their is only one other Royalty owner case 75-84-C, 75-85-C, 75-86-C that has been brought before the TECA and that case was Certified by U. S. District Judge Joseph W. Morris dated 2-17-76 ruled "That the case does indeed involve a substantial constitutional issue, thus defeating a move for dismissal by the Federal Government." (See Appendix D). Page 80 in part that the Court is indecisive, "nor is it proper for the Court's consideration that it agrees with the conclusions reached by the agency so long as there is a RATIONAL BASIS for the agency's action. Also "The purpose of the two pricing system, at least the reasons for which it was instituted, SEEMS to be clear. Whether it works properly in all its aspects is another matter. Also, Court: "I have no doubt that rules could have been devised that would have alleviated the problems confronted by this Plaintiff, but

whether they could have been is not the issue. Page 81 "The Court might say it is pleased to hear that there are changes being made." Page 80 "The Court does not believe there is any substantial constitutional question." Page 82 "AS it relates to the issues by the Agency transcript". Plaintiff takes issue with this Court's following quote "So long as there is a RATIONAL BASIS for the Agency's action". How can any Court condone, sanction or justify RATIONAL BASIS in this case, when there are overwhelming issues, facts and evidence submitted showing that the Defendants are out of bounds and out of line in their administrative authority.

STATEMENT OF THE CASE

This is the first case of its kind to be brought before this court seeking recovery of damages, where two different prices of $5.14 to $12. or open market prices for crude oil, where the Royalty owner has an interest in both identical adjoining units. The production comes from the same 69 year old oil field and the Kiefer Unit was pumped down to an average of 3.44 bbls. per oil well before unitized on 5-1-59 for conservation. The production on both Kiefer Unit and West Glenn Sand Unit comes from the same strata; same depth; same gravity of oil and comingling oil and water on the border lines. Because of the depletion of oil and the water pressure since 1959 the original 421 oil wells have been reduced to 78 oil wells. Now the FEA will not consider the contingencies (water flood pressure and reduction of producing oil wells) in the Kiefer Unit when applying

their 210.32 Rule of 10 bbls. per oil well.

The issues before the court is whether the 5th and the 10th Amendment to the U. S. Constitution has been violated. "NO PERSON SHALL BE DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW, NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION". Also, the 10th Amendment "THE POWER NOT DELIGATED TO THE U. S. BY THE CONSTITUTION NOR PROHIBITED BY THE STATES ARE RESERVED TO THE STATES RESPECTIVELY OR TO THE PEOPLE".

The Federal Energy Administration wants the court to uphold their constitutional administrative rights, but they want to circumvent individual rights with their double standards, by omitting the 5th and 10th amendment.

The outcome of this case may have an impact on those similar cases where adjoining oil properties in the same oil field with similar conditions.

FACTS ADDUCED AT TRIAL

Defendants FEA use a double standard of values when they try to circumvent the issues by illegally omitting the 5th and 10th U. S. Constitutional Amendments that plainly states; " NO PERSON SHALL BE DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW, NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION".

This issue is significant, because the Defendants have ignored, since 1974, when Plaintiff plea for fair, equal and just treatment. The Defendants have used as their

defense RATIONAL BASIS for their reasoning to justify their actions. Plaintiff asks this Court: Is it rational for the Defendants to cause the following to the Plaintiff?

A. Devalue Plaintiff's Real Property when that property in question adjoins a like property when both Unitized Kiefer Unit and West Glenn Sand Unit are similar in every respect with production from the same 69 year old oil field, with the same strata, same depth, same gravity of oil, co-mingling water and oil on the boundary lines, but restricts one to receive $5.14 per bbl. of oil and permits the other $12. or free market prices. This action by the Defendant has caused Plaintiff's property value to automatically depreciate in value. This was caused by the FEA withholding a release order, even though basically both Units are similar.

B. Is it RATIONAL to cause Plaintiff to receive LESS THAN HALF the open market price, or approximately $6.75 differential for the same identical quality of oil that the adjoining Unit is receiving?

C. Is it RATIONAL for the Defendants to cause Plaintiff to subsidize every bbl. of oil to the Public without remuneration?

D. Is it RATIONAL for Defendant to cause Plaintiff to liquidate part of his Real Property and Private Property and assets without just compensation?

E. Is it RATIONAL for the Administrator for the FEA to deny Plaintiff's Application and Appeal for exception &/or exemption, when Plaintiff presented ample proof for FEA to yield.

F. Is it RATIONAL for the Defendants to dictate how much Plaintiff can sell his interest share of the Crude Oil Payment, when it is all handled intra-state (within the state)?

G. Is it RATIONAL for the U. S. District Court for the Northern District of Oklahoma to sustain the Motion for Summary Judgment in behalf of Defendants, when all the above reasons were presented? Also, on 2-17-76 the ruling of the U. S. District Judge Joseph W. Morris case # 75-84-C, 75-85-C, 75-86-C that the 3 Royalty owners case indeed involves a substantial 5th Amendment of the U. S. Constitutional issue. See Appendix "G".

The 10th Amendment of the U. S. Constitution states "THE POWER NOT DELIGATED TO THE U. S. BY THE CONSTITUTION NOR PROHIBITED BY THE STATES ARE RESERVED TO THE STATES RESPECTIVELY OR TO THE PEOPLE". This Amendment restricts the FEA in this Civil Action because;

A. Plaintiff's interest is in the land and mineral rights and they are all within Oklahoma.

B. Plaintiff has the option to receive his share either in Crude Oil or Cash payments, which is all within the state of Oklahoma.

C. All the crude oil has always been sold intra-state (or within Oklahoma) and FOB (free on board) Plaintiff's property or land that he pays taxes on.

D. Plaintiff has no pipelines, refineries, retail outlets or imports to be classified as an inter-state (commerce outside of Oklahoma) seller, or to be restricted by Federal Controls.

Defendants have misused and abused their Rule 210.32 , because it plainly states that , "A property, A lease all in a singular person and nothing about Declared Unitized Secondary Water Flooding. Defendants have circumvented the written rules by using illogical reasoning in Plaintiff's case. The Kiefer Unit was unitized on 5-1-59 with 37 separate leases, retaining their identity, that has 2170 acres, on a 69 year old oil field that was pumped down to 3.44 bbls. of oil out of 421 producing oil wells. The oil field was unitized because it was not economically feasable to operate at 3.44 bbls. per oil well and also conservation was a consideration. However, over the past 17 years the 421 oil wells through depleted strata and engineering artificial water pressure, these wells were reduced to 78 oil wells. Now the FEA want to apply the 10 bbl. per oil well rule. This action is not reasonable as the oil wells will continue to reduce and still produce more than 10 bbls. per oil well down to a minimal few oil wells. Also, if for any reason the present artificial water pressure was cut off because of a drought, or Environmental Protection Agency restrictions, the whole oil field production would drop below 3.44 bbls. per oil wells, because there is no primary production remaining. It is estimated that this 69 year old oil field has

approximately 3 to 5 years remaining of unitized production. The oil strata is not like farm land that can be fertalized and retain production. Artificial water pressure does not increase the amount of oil in the strata, it only helps make the remaining oil available to pump.

REASONS FOR GRANTING WRIT

The granting of this Writ will clarify the Constitutional issues in questions, and protect individual rights as set out in the 5th and 10th Amendments of the U. S. Constitution, the corner stone of our country.

Also, when Federal Agencies misuse their authority and subordinate courts mishandle or misjudge a case, this Writ is a means in our judicial system that may rectify an injustice.

CONCLUSION

In conclusion, the decision, based on undisputed facts in the lower court has taken away the fundamental rights of individual and States by under mining and ignoring the corner stone of our judicial system, the United States Constitution.

This case is one of extreme importance, because other similar Congressional legislation administered by Federal Agencies may again circumvent the Constitutional rights

of all concerned if this situation is not corrected now.

Therefore, the decision in the lower court, should be reversed and changed so that individuals will not be ripped-off and will have their rights protected the same as corporations and government agencies. Also, this can be used as an important step to help eliminate future unjust decisions.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

D. L. Withington

D. L. Withington
Petitioner, Pro Se

PROOF OF SERVICE

I, D. L. Withington, Petitioner Pro Se, is authorized to make this Affidavit. He hereby certifies that copies of the foregoing Application for Writ of Certiorari has been mailed postage prepaid to the following:

Supreme Court of the U. S.
Office of the Clerk
Washington, D. C. 20543

Solicitor General
Dept. of Justice
Washington, D. C. 20530

Federal Energy Administration Atty.
Ms. Linda L. Pence
Mr. Robert E. Kopp
Department of Justice
Washington, D. C. 20530

D. L. Withington
D. L. Withington
Petitioner Pro Se
4539 So. Lewis
Tulsa, Oklahoma 74105

Sworn to and subscribed before me, the undersigned authority, this 14th day of December, 1976

Notary Public in and for
Tulsa County, Oklahoma Linda A. Lunger

My Commission Expires My Commission Expires May 3, 1978

APPENDIX A

IN THE UNITED STATES DISTRICE COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

D. L. WITHINGTON,

Plaintiff,

v. Civil Action No. 75-C345

FEDERAL ENERGY ADMINISTRATION, et al.,

Defendants.

O R D E R

This matter comes before the Court on the "Motion to Dismiss or in the Alternative for Summary Judgment" filed by defendants Frank G. Zarb, Administrator of the Federal Energy Administration and the Federal Energy Administration. The Court having read all memoranda and the administrative record filed in this action and having heard oral arguments presented by the parties has determined that there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law. Accordingly, it is this 10th day of June, 1976,

ORDERED, that defendants' Motion is

granted and judgment is entered in favor the defendants.

H. DALE COOK
United States District Judge

APPENDIX A-1

9-23-76

U. S. District Court
For Northern District of Okla.
Attn: Judge H. Dale Cook
333 West 4th
Tulsa, Oklahoma 74105

Subj: Civil Action 75-C-345

Gentlemen:

This letter is to confirm Plaintiff's telephone conversation on 9-21-76 with Judge H. Dale Cook's staff attorney Ms. Chris Ward relative to the confusion in legal proceedure to Appeal to higher Courts as outlined by the U. S. District Court for Northern District of Oklahoma on 6-4-76 directing and stating in the certified transcript on the subject Civil Action.

The Court advised the Plaintiff Pro Se when Plaintiff addressed the Court asking "Do I have a right to appeal? The Court: (Page 82) Yes, there is the Circuit Court of Appeals of the Tenth Judicial Circuit, which would be willing, I AM CERTAIN, to review this matter. You do have the right." As advised by the Court Plaintiff Appealed on time to the 10th Circuit Court of Appeals only to find that the Motion by the Defendant to Dismiss which was granted for the reason that exclusive jurisdiction was vested by statute in the TECA Temporary Emergency Court of Appeals. Plaintiff immediately directed the Notice of Appeal to the TECA, which was rejected on 9-16-76, because the 30 day time limit had expired when Appealing from a U. S. District Court, thereby, causing the Plaintiff to file to the next highest Court (after all avenues

had been exhausted) The Supreme Court of United States. The error made by the Northern U. S. District Court immediately telephoned the TECA on 9-20-76 and 9-21-76 to endevor to rectify the mistake, but all was in vain.

If there is no contrary response to the Plaintiff on the above statements, it will be assumed for Court records that the above statements, are true, as Court Records will reveal.

Sincerely

D. L. Withington

D. L. Withington
Plaintiff, Pro Se
4539 S. Lewis
Tulsa, Oklahoma 74105
Tel. 918-7427070

APPENDIX B

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

D. L. WITHINGTON,

Plaintiff-Appellant,

vs. NO. 76-1612

FEDERAL ENERGY ADMINISTRATION and FRANK G. ZARB, Administrator of the Federal Energy Administration,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

(D.C. NO. 75-C-345)

Appellant appeared pro se.

Linda L. Pence and Robert E. Kopp Appeared on behalf of appellee.

Before Honorable John C. Pickett, United States Senior Circuit Judge, and Honorable Oliver Seth and Honorable Robert H. McWilliams, United States Circuit Judges

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PER CURIAM

Appellant Withington brought action in the United States District Court for the Northern District of Oklahoma challenging certain decisions, orders and regulations promulgated by the Federal Energy Administration (FEA) pursuant to the Emergency Allocation Act of 1973, as amended (EPAA), 15 U.S.C. #751, et seq. Summary judgment was entered in favor of the defendants to that action (appellees in the instant appeal) on June 10, 1976 and Withington brought the instant appeal. Appellees have now filed a motion to dismiss the instant appeal based upon the ground that jurisdiction over this appeal lies with the Temporary Emergency Court of Appeals and this court accordingly lacks jurisdiction. We agree and the motion to dismiss is granted for the reasons that follow.

As a result of the energy crisis of 1973, the Cost of Living Counsel (pursuant to the Economic Stabilization Program) devised a system of price controls applicable to the petroleum industry. Also in 1973 Congress passed the Emergency Petroleum Allocation Act which delegated to the President of the United States temporary authority to take necessary action in response to the energy crisis. Briefly stated, the end result was a two-tiered pricing program devised to control the price of domestic crude oil. Administration of this pricing program eventually devolved to the Federal Energy Administration. Withington's complaints in this action relate to this two-tiered pricing system.

The two-tiered pricing system catagorizes domestically produced crude oil into "old crude oil" and "new crude oil". "Old" oil is defined as that included in a level of production equal to or less than that which existed prior to the base year 1972. "New" oil is defined as that level of production which exceeds the production levels prior to the base year 1972. "Old" oil is subject to an established ceiling price. "New" oil may be priced at the current market level, substantially higher than the ceiling price applicable to "old" oil.

Withington owns royalty interests in crude oil produced from property which is subject to secondary recovery operations and which falls within the category of "old" oil. Withington understandably seeks removal of his oil from this category to enable him to receive the substantially higher market price applicable to "new" oil. He first sought a "stripper well" exemption from the Federal Energy Administration. Denied this, he took his complaints to the district court where he also contended that the price control system itself was unconstitutional. The district court entered summary judgment in favor of the appellees after concluding that Withington's interests did not fall within the "stripper well" exemption; a rational basis existed for the two-tiered pricing system; and that Withington's constitutional claims had been well settled by the Temporary Emergency Court of Appeals. This appeal followed.

We note at the outset that, in response to Withington's questions regarding an appeal from the district court's judgment, the district court indicated that an appeal would lie with this court. That is not

the case however. "In enacting #5 of the EPAA, 15 U.S.C.A. #754(a)(1), Congress incorporated #211(b)(2) of the Economic Stabilization Act of 1970, 12 U.S.C.A. #1904, note, which provides that the newly created Temporary Emergency Court of Appeals (TECA) shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this Title...'" M. Spiegel & Sons Oil Corp. v. B. P. Oil Corp., 531 F. 2d 669 at 670 (2nd Cir. 1976). The subject matter of Withington's complaints relates directly to administration of programs promulgated pursuant to the Emergency Petroleum Allocation Act and thus arises under the Act. Exclusive jurisdiction to review the district court's judgment is accordingly vested by statute in the Temporary Emergency Court of Appeals. See, Bray v. United States, __U.S. __(1975), 96 S.Ct. 307; M. Spiegel & Sons Oil Corp. v. B.P.Oil Corp., supra; United States v. Cooper, 482 F.2d 1393 (TECA 1973).

The motion to dismiss is granted and the appeal is dismissed.

APPENDIX C

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES
Office of the Clerk
UNITED STATES COURTHOUSE
WASHINGTON, D. C. 20001

RUTH H. JACOBSON
CLERK

September 16, 1976

Mr. D. L. Withington
4539 South Lewis
Tulsa, Oklahoma 74105

Dear Mr. Withington:

This letter shall acknowledge receipt of your notice of appeal.

Please be advised that the appeal connot be filed with this court pursuant to Rule 15(a), T.E.C.A. and Rule 3(a), Federal Rules of Appellate Procedure, which states that a notice of appeal must be filed within 30 days of the entry of judgment by the district court. You have the right to appeal from a district court order but not an order from another appeals court. When you are appealing from a court of appeals order, you must file notice to the next highest court -- The Supreme Court of the United States. In this particular instance, if you chose to appeal from the district court order, your filing would be deemed untimely pursuant to Rule 15(a).

For the reasons set forth above, I am returning your check for $50.00 and all pleadings which were received by the court. If you have any questions, please contact this office.

Sincerely,

Ruth H. Jacobson
Clerk

By
Donna M. Bold
Chief Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
Office of the Clerk
469 United States Courthouse
Denver, Colorado 80202

November 11, 1976

Michael Rodak, Jr., Clerk
Supreme Court of the United States
Supreme Court Building
Washington, D. C. 20543

Attention: Edward C. Schade, Assistant Clerk

Re: No. 76-1612, Withington v. Federal Energy Administration, et al

Dear Mr. Rodak:

Attached is a notice of appeal filed with this Court on November 10,1976, together with two explanatory letters related to its history.

We are sending a copy of this letter to Mr. D. L. Withington of Tulsa, who is attempting, pro se, to appeal this matter to your Court. Since your office, on November 1, 1976, returned the filing fee to Mr. Withington, it would seem proper for him immediately to forward to you his check in the amount of $150.00 to cover your filing fee.

For your information as to the date of this Court's judgment, we are certifying and attaching a copy of the docket in the captioned case.

If there is anything further you need from this office in connection with this appeal, please let us know.

Very truly yours,

Howard K. Phillips
Clerk

CC: D. L. Withington, 4539 South Lewis Avenue, Tulsa, Oklahoma 74105
Linda L. Pence, Robert E. Kopp, Department of Justice, Washington, D. C. 20530
Jack C. Silver, Clerk, U. S. District Court, 411 U. S. Courthouse, Tulsa, Oklahoma 74103

APPENDIX E

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

November 18, 1976

Mr. D. L. Withington
4539 South Lewis
Tulsa, Oklahoma 74105

Re: D. L. Withington v. Federal Energy Administration, et al., A-405

Dear Mr. Withington:

Your application in the above-entitled case has been presented to Mr. Justice White who, on November 17, 1976, signed an order extending your time to and including December 23, 1976 A copy of the Justice's order is enclosed.

Your notice of appeal is again returned, inasmuch as it must be filed with the clerk of the court whose judgment you are appealing, not with the Clerk of this Court. At the same time, your petition for a writ of certiorari and/or jurisdictional statement and the appendices thereto must be printed in conformity with Rule 39 of the Rules of this Court and bound together as specified in Rule 39.

It would appear that the appropriate means to review the judgment of the United States Court of Appeals for the Tenth Circuit is by filing a petition for a writ of certiorari and 28 U.S.C. 1254 concerning

jurisdiction of the Supreme Court.

Enclosed is a copy of the Rules of this Court and a sample printed petition for certiorari which you may follow as to form only.

Your two checks totaling $150.00 are herewith returned. A docket fee of $100. must accompany your case at the time it is filed. In the event oral argument is to be had, an additional $50.00 fee will be required.

Very truly yours,

Michael Rodak, Jr., Clerk

By

Francis J. Lorson
Deputy Clerk

CC: Solicitor General of the U. S.

Clerk, U.S. Court of Appeals
for the Tenth Circuit (Your No 76-1612)

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-405

D. L. WITHINGTON,

Applicant,

v.

FEDERAL ENERGY ADMINISTRATION, ET AL.

O R D E R

UPON CONSIDERATION of the application of applicant,

IT IS ORDERED that the time for docketing an appeal and/or filing a petition for writ of certiorari in the above entitled cause be, and the same is hereby, extended to and including December 23, 1976.

/s/ Byron R. White
Associate Justice of the Supreme
Court of the United States

Dated this 17th day of November, 1976

Oklahoma Trial Sought for Royalty Owners Oil Price Case

A royalty owners' suit seeking "just compensation" for e difference between their frozen "old" oil price and e free-market price allowed other oil should be tried in klahoma rather than a special court in Washington, acrding to a brief filed by the plaintiffs.

The case last month survived a critical test in Federal strict Court in Muskogee when U.S. Dist. Judge Joseph Morris ruled the issue involves a substantial constitunal question—that is, are owners of controlled oil ces entitled to recover compensation on grounds that ir property was taken for the public benefit.

HOWEVER, FEDERAL LAW HAS CREATED A TEMrary Emergency Court of Appeals in Washington to ndle energy matters exeditiously and cases involving nstitutional issues must be certified to that court for tlement. Morris, therefore, issued such a certification d sent the case to the TECA in Washington.

Charles Nesbitt, attorney for the royalty owners, said a brief that the law creating TECA meant it would handle only cases where the constitutionality of the energy price-fixing law is challenged.

As he did throughout the hearings before the Muskogee court, Nesbitt said his clients are not challenging the legality of the law as numerous other cases have. Instead, the royalty owners admit the law is constitutional.

However, the plantiffs contend that forced sale of their crude at prices below the free market allowed other oil—ordered by the government for the public benefit to curb inflation—constituted the taking of property. The Fifth Amendment of the U.S. Constitution states, in effect, that "just compensation" must be paid for property taken for public use.

Nesbitt said the constitutional question does not involve the law under which prices were regulated and, therefore, it should not be handled by TECA. Consequently, he asked the case be returned to the Muskogee court.

To support his contention, Nesbitt cited two sections c the law creating TECA which outlined its jurisdiction a exclusive for determining "constitutional validty" of er ergy laws. When these sections are considered, Nesbit said, it is obvious that the "substantial constitutional questions which must be certified to TECA must involv attacks on the law itself.

Since the plaintiffs agree the law is constitutional, Ne bitt repeated, certification to TECA is inappropriate an the case should be remanded to Muskogee for trial.

TECA has been called the graveyard for suits attack ing energy laws since the court has repeatedly uphel their constitutionality.

Nesbitt, however, said he is not discouraged becaus the nature of his case is different. In fact, Judge Morri said, it is the first of its kind to be filed in the U.S.

Plantiffs are R. L. Griffin, Maurice Lampe and Elber Griffin of Madill.

TULSA OIL WORLD
PAGE 27
APPENDIX "G"

Owners of Royalty Win 1st Round in Suit

By RILEY W. WILSON

A complete first-round victory has been won by three Oklahoma royalty owners in a federal court suit that eventually could affect billions of dollars in revenue lost to the oil industry under the two-tier crude oil price control system.

The suit admits the constitutionality of the pricing system, but contends the ceiling rate on "old", oil constitutes the taking of property for the public welfare without just compensation in violation of the Fifth Amendment to the U.S. Constitution.

The plaintiffs, R. L. Griffin, Murice Lampe and Elbert Griffen, seek "just compensation" for the difference between the $5.20 frozen price of "old" oil and $12-plus free-market price allowed other oil.

U.S. DISTRICT JUDGE JOSEPH W. Morris, according to records available Monday, has ruled that the case does, indeed, involve a substantial constitutional issue, thus defeating a move for dismissal by the federal government.

In so ruling, Morris certified the case to the Temporary Emergency Court of Appeals in Washington, which was created to handle energy matters expeditiously.

Morris said the constitutional issue certified to the TECA is:

"HAVE ROYALTY OWNERS, whose crude oil is subject to the ceiling price as determined under the regulations and who may not sell their crude oil at a price in excess of the ceiling price had their property taken for public use for which they may recover just compensation from the United States pursuant to the Fifth Amendment of the Constitution of the United States?"

In seeking dismissal and summary judgment, federal attorneys argued that the two-tier pricing system is legal and has been upheld in higher courts.

Attorney for the royalty owners, Charles Nesbitt, successfully argued that the validity of the rules is not an issue in this case.

IN HIS RULING, IN FACT, MORRIS said the plaintiffs "made it unequivocally clear" that they admit the "constitutionality, legality and validity of the regulations."

"Rather," Morris said, "they seek just compensation for the partial taking of their property by the United States in applying to their royalty oil unreasonable, arbitrary and discriminatory regulations which force them to accept a price of $5.20 per barrel while allowing adjoining or nearby royalty owners to sell their royalty oil at approximately $12 a barrel." After the suit was filed, free-market oil rose to nearly $14 a barrel.

THE GOVERNMENT ATTORNEY cited many cases in which the validity of the rules themselves had been upheld.

Morris again said the plaintiffs agree the rules are legal, but he added:

"... because of what they say is a taking for public use of their property they are entitled to just compensation. They argue that this is the first and only case which has been brought by anyone seeking the relief which they ask. The defendant (the U.S.) has cited no authority which disputes this contention."

THE EMERGENCY APPEALS court in Washington has been called the "graveyard" for attacks against federal energy laws and regulations because it has almost always upheld the government.

Nesbitt said, however, that he is optimistic because the special court — like the district court — has never faced the issue posed by the Oklahoma case.

"All their other decisions involved the legality of the rules and we aren't contesting that," Nesbitt said. "We are arguing that we are entitled to compensation for property rightfully taken."

Nesbitt said the two-tier pricing system was taken under laws designed to benefit the general welfare of the nation, but under the Constitution those who suffer must be compensated under these circumstances.

CASE # 75-84-C
75-85-C
75-86-C

No. 76-957

In the Supreme Court of the United States

OCTOBER TERM, 1976

D. L. WITHINGTON, PETITIONER

v.

FEDERAL ENERGY ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-957

D. L. WITHINGTON, PETITIONER

v.

FEDERAL ENERGY ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner brought this action in the United States District Court for the Northern District of Oklahoma to challenge certain actions of the Federal Energy Administration pursuant to the Emergency Petroleum Allocation Act of 1973, 87 Stat. 627, as amended, 15 U.S.C. (Supp. V) 751 *et seq.* On June 10, 1976, the district court entered summary judgment in favor of respondents (Pet. App. A). On June 21, 1976, petitioner filed notice of appeal to the Court of Appeals for the Tenth Circuit. On August 25, 1976, the Tenth Circuit dismissed the appeal for lack of jurisdiction (Pet. App. B).

The decision of the Tenth Circuit is correct since appeal in cases of this type lies exclusively in the Temporary Emergency Court of Appeals. The Emergency Petroleum Allocation Act, 15 U.S.C. (Supp. V) 754(a)(1) expressly incorporates Section 211(b)(2) of the Economic Stabilization

Act of 1970, as added, 85 Stat. 749, reprinted in the note to 12 U.S.C. (Supp. V) 1904, which provides that the Temporary Emergency Court of Appeals "shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title * * *." Consequently, the Temporary Emergency Court of Appeals and not the Court of Appeals for the Tenth Circuit had jurisdiction over petitioner's appeal. *M. Spiegel & Sons Oil Corp.* v. *B.P. Oil Corp.*, 531 F. 2d 669 (C.A. 2). See *Bray* v. *United States*, 423 U.S. 73; *United States* v. *Cooper*, 482 F. 2d 1393 (T.E.C.A.). Accordingly, the petition for a writ of certiorari should be denied.[1]

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

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[1]The record indicates that during the hearing on respondents' motion to dismiss, the district court suggested that petitioner could appeal to the Tenth Circuit (Tr. 82), and that after the Tenth Circuit dismissed petitioner's appeal for lack of jurisdiction the clerk of the Temporary Emergency Court of Appeals refused to accept petitioner's notice of appeal in that court as untimely (Pet. App. C). If petitioner believes that those facts constitute unique circumstances warranting waiver of the time requirements of the rules of the Temporary Emergency Court of Appeals (see *Fallen* v. *United States*, 378 U.S. 139; *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215), his proper recourse is to file a motion in the Temporary Emergency Court of Appeals requesting that his untimely appeal be accepted for filing. See *Reed* v. *Kroger Co.*, 478 F. 2d 1268 (T.E.C.A.).

It should be noted, however, that notwithstanding the district court's suggestion, petitioner had ample notice that appeal could be taken only in the Temporary Emergency Court of Appeals. In addition to the notice provided by the statute, respondents' motion to dismiss the appeal, which pointed out the Tenth Circuit's lack of jurisdiction, was served on July 2, 1976, ten days before the expiration of the time to appeal to the Temporary Emergency Court of Appeals. Despite that notice, petitioner failed to perfect his appeal to the latter court.

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